Filed 7/28/20 D'Aguiar v. T-Mobile USA, Inc. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FLOYD D'AGUIAR, Plaintiff and Appellant, v. T-MOBILE USA, INC., Defendant and Respondent.	H045122 (Santa Clara County Super. Ct. No. 17CV309491)

I. INTRODUCTION

Plaintiff Floyd D'Aguiar, a self-represented litigant, filed a civil action against defendant T-Mobile USA, Inc. Defendant thereafter filed a petition to compel arbitration, which the trial court granted. Plaintiff appeals from the order compelling arbitration. Because the order is not appealable and writ review is not appropriate, we must dismiss the appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Plaintiff's Complaint*

In May 2017, plaintiff filed a civil action against defendant alleging that he is a "pre-paid cellphone customer" of defendant. Plaintiff alleges that defendant "has taken advantage of anonymity in activation of pre-paid service and the absence of monthly detailed billing, to over bill prepaid minutes, over charge minutes, deduct third party

charges, to reduce prepaid minutes." Defendant also allegedly "raised [the] price per minute without" plaintiff's knowledge and "provided no benefit for advertised Gold Membership."

Plaintiff further alleges in his complaint that he requested "24 months of calling records of incoming and outgoing calls," but that defendant denied his request because he lacked a subpoena. When plaintiff allegedly provided a subpoena dated February 23, 2017, defendant initially indicated that the "request was in process and will soon be delivered." However, defendant allegedly had "no intent of obeying" the subpoena and instead sought to "intentionally cause delay and deny" the request. Defendant eventually indicated that the subpoena was defective and that a court order was required for the records. Plaintiff alleges that defendant "may have caused irreparable harm, inconvenience, obstruction of justice, and intentionally caused lapsing/expiration of calling records, due to negligence misrepresentation and deceptive practice . . . ."

In a cause of action entitled "first & second cause of action" for "fraud" and "negligent misrepresentation," plaintiff alleges that defendant "made false representations of material fact in its contract and false representations via text messages that confirmed balance of minutes and gold member status." (Capitalization, boldface, and underscoring omitted.) He alleges that defendant continuously notified him by text message to "act and renew prepaid minutes," and that he "justifiably believed" and "relied on such text notifications." Plaintiff also "alleges negligent misrepresentation and negligence in honoring subpoena of Feb 23, 2017 with respect to time sensitive calling records that was requested that caused irreparable harm/damages to [plaintiff]."

In a cause of action entitled "third, fourth & fifth cause of action" for "unfair & deceptive business practice," "breach of contract," and "breach of the covenant [of] good faith & fair dealing," plaintiff alleges that he "has incurred financial damages and has repeatedly replenished prepaid minutes $100 and $50 at a time, for several years, and has also incurred State taxes on prepaid minutes . . . ." (Capitalization, boldface, and

underscoring omitted.) He further "alleges breach of contract, unfair & deceptive business practices, and breach of the covenant of good faith and fair dealing, by [defendant] failing to engage in fair dealing with [him] as is an implied contractual duty and obligation of duty of care." As in the previous causes of action, plaintiff "alleges negligent misrepresentation and negligence in honoring subpoena of Feb 23, 2017 with respect to time sensitive calling records that was requested that caused irreparable harm/ damages to [plaintiff]."

In his prayer for relief, plaintiff seeks the calling records regarding his cell phone and seeks damages, among other amounts. He also seeks "injunctive relief against [defendant] to prevent future wrongful conduct."

B. *Defendant's Petition to Compel Arbitration*

1. Defendant's Petition

In June 2017, defendant filed a petition to compel arbitration and to stay the civil action. Defendant contended that plaintiff, in activating and using its prepaid service, agreed to be bound by written "Terms and Conditions," which contained an arbitration provision. The "Terms and Conditions" state: "[B]y activating or using our service, you agree to be bound by these Terms and Conditions ('T&Cs'). Please read these T&Cs carefully. They affect your legal rights by, among other things, requiring mandatory arbitration of disputes . . . . If you do not agree to these T&Cs, do not activate or use the service or your wireless phone . . . ." (Some capitalization omitted.)

Regarding arbitration, the Terms and Conditions state: "Please read this provision carefully. It means that . . . you and we will arbitrate our disputes. Any claim or dispute between you and us in any way related to or concerning the agreement, or the provision of services or products to you, including any billing disputes ('claim'), shall be submitted to final, binding arbitration before the American Arbitration Association ('AAA')." (Some capitalization omitted.) The arbitration provision further states: "Before instituting arbitration, you agree to provide us with an opportunity to resolve your claim

by sending a written description of your claim to us at T-Mobile customer relations . . . and negotiating with us in good faith regarding your claim. If we are not able to resolve your claim within 30 days of receipt of your notice, then you or we, instead of suing in court, may initiate arbitration proceedings with the AAA." (Some capitalization omitted.)

In the petition to compel arbitration, defendant argued that plaintiff's claims in the civil action arose out of his prepaid line of service with defendant, and therefore plaintiff's claims were subject to the arbitration provision.

2. Plaintiff's Opposition and Defendant's Reply

In written opposition, plaintiff contended that defendant had waived the right to compel arbitration and that his claims were not covered by the arbitration provision. In reply, defendant contended that no waiver had occurred, and that the arbitration provision encompassed plaintiff's claims.

3. The Trial Court's Order Compelling Arbitration

On July 18, 2017, a hearing was held on defendant's petition.[1] In a written order filed that day, the trial court granted the petition to compel arbitration and stayed the civil action. The court also denied plaintiff's request for a continuance and for leave to file supplemental briefing.

C. *Plaintiff's Motion for Reconsideration*

1. Plaintiff's Motion

On August 2, 2017, plaintiff filed a motion for reconsideration regarding the trial court's order compelling arbitration.[2] Plaintiff again contended that defendant had waived its right to arbitration, and that the arbitration provision did not cover plaintiff's

---

[1] The record on appeal does not include a reporter's transcript of the hearing.

[2] Plaintiff's motion was entitled, "a) Motion to Compel Production of Calling Records, and b) Motion to Review / Reconsider & Rescind Compel Arbitration Order of July 18, 2017." (Some capitalization omitted.)

claims regarding call records and illegal billing charges. Plaintiff also argued that defendant had not properly mailed or timely e-mailed pleadings or filings to him, that the arbitration agreement was unconscionable and unenforceable, that the trial court's order compelling arbitration was contrary to a recently issued rule by the Federal Trade Commission regulating arbitration agreements in consumer contracts, and that defendant had not properly sought a stay of the civil action.

2. Defendant's Opposition

Defendant opposed the motion for reconsideration. Defendant contended that plaintiff failed to meet the requirements for a motion for reconsideration under Code of Civil Procedure section 1008, subdivision (a), by providing new facts or law, or by adequately explaining why his arguments could not have been presented earlier. Defendant also argued that none of plaintiff's purportedly new arguments had merit.

3. Plaintiff's Reply

In reply,[3] plaintiff argued that (1) the arbitration provision's limitation on public injunctive relief rendered the arbitration provision unenforceable pursuant to *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 (*McGill*);[4] (2) a class action waiver in the arbitration provision was unconscionable and unenforceable;[5] and (3) the arbitration provision was

---

[3] Plaintiff's reply brief was entitled, "Supplemental Declaration in Support of [¶] a) Motion to Compel Production of Calling Records, and b) Mot to Review / Reconsider & Rescind Compel Arbitration Order of July 18, 2017 [¶] and, [¶] Reply to Respondent's Opposition of Motions." (Some capitalization omitted.)

[4] Regarding injunctive relief, the arbitration provision states: "An arbitrator may issue injunctive or declaratory relief but only applying to you and us and not to any other customer or third party."

[5] Regarding class actions, the arbitration provision states: "Class Action Waiver. Whether in court, small claims court, or arbitration you and we may only bring claims against each other in an individual capacity and not as a class representative or a class member in a class or representative action. . . . [I]f a court or arbitrator determines in a claim between you and us that your waiver of any ability to participate in class or (continued)

unconscionable for the following reasons: the "Terms of Service" were inside a sealed box with the mobile phone and plaintiff was not made aware of the arbitration provision, the arbitration provision required plaintiff to submit all disputes to arbitration but allowed defendant to avoid arbitration for claims pursued through a collection service,[6] the arbitration provision limited damages, and defendant had the right to make changes to the agreement without plaintiff's consent. Regarding the first point, plaintiff contended that he had pleaded violations covered by the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.),[7] and that he had sought public injunctive relief under that act (see § 1780).

4. The Trial Court's Order Denying Reconsideration

On September 5, 2017, a hearing was held on plaintiff's motion for reconsideration.[8] By written order filed that day, the trial court denied the motion for reconsideration.

D. *Plaintiff's Appeal*

On September 14, 2017, plaintiff filed a notice of appeal from the July 18, 2017 order compelling arbitration.

---

representative actions is unenforceable under applicable law, the arbitration agreement will not apply, and you and we agree that such claims will be resolved by a court of appropriate jurisdiction, other than a small claims court." (Some capitalization omitted.)

[6] Regarding the exclusion for claims pursued through a collection service, the arbitration provision states: "As a limited exception to the agreement to arbitrate, you and we agree that: (a) you may take Claims to small claims court, if your Claims qualify for hearing by such court; and (b) if you fail to timely pay amounts due, we may assign your account for collection, and the collection agency may pursue in court claims limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement."

[7] All further statutory references are to the Civil Code unless otherwise indicated.

[8] The record on appeal does not include a reporter's transcript of the hearing.

III. DISCUSSION

Defendant has moved to dismiss plaintiff's appeal on the ground that the order compelling arbitration is not an appealable order. Plaintiff requests that we treat his appeal as a petition for writ of mandate.

An order *denying* a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) "In contrast, orders *compelling* arbitration are considered interlocutory and are not appealable. [Citation.] 'The rationale behind the rule making an order compelling arbitration nonappealable is that inasmuch as the order does not resolve all of the issues in controversy, to permit an appeal would delay and defeat the purposes of the arbitration statute.' [Citation.]" (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160 (*Zembsch*).) Moreover, the fact "that the order compelling arbitration is interlocutory in nature . . . works no hardship on the litigant because the party who objects to arbitration may win at the arbitration hearing, and if he does not, the issue is reviewable on appeal from the judgment of confirmation. [Citation.]" (*State Farm Fire & Casualty v. Hardin* (1989) 211 Cal.App.3d 501, 506.)

Because plaintiff has appealed from the order compelling arbitration, which is a nonappealable order, we turn to plaintiff's request that we treat the appeal as a petition for writ of mandate.

Review by extraordinary writ may be available for an order compelling arbitration, but such review "is rarely warranted." (*Zembsch, supra*, 146 Cal.App.4th at p. 160.) "[W]rit review of orders directing parties to arbitrate is available only in 'unusual circumstances' or in 'exceptional situations.' [Citations.]" (*Ibid.*) "California courts have held that writ review of orders compelling arbitration is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive. [Citations.]" (*Ibid.*) The first circumstances may implicate the second circumstance. For example, as explained by one appellate court, "any arbitration

compelled in the absence of a valid, enforceable arbitration agreement is an unduly time consuming and expensive proposition. Writ review is the appropriate way to review the challenged order and avoid having parties try a case in a forum where they do not belong, only to have to do it all over again in the appropriate forum." (*Medeiros v. Superior Court* (2007) 146 Cal.App.4th 1008, 1014, fn. 7 (*Medeiros*).)

Plaintiff raises several arguments as to why writ review is appropriate here, but we do not find any of those arguments persuasive.

First, we understand plaintiff to contend that his claims are outside the scope of the arbitration provision. He argues that (1) the parties' "dispute . . . over prepaid calling records" and (2) his claim for negligent misrepresentation are not covered by the arbitration agreement.

The arbitration provision states: "Any claim or dispute between you and us in any way related to or concerning the agreement, or the provision of services or products to you, including any billing disputes ('claim'), shall be submitted to final, binding arbitration before the American Arbitration Association ('AAA')." (Some capitalization omitted.) Arbitration provisions, such as this one, that cover any dispute " 'relating to' " or " 'concerning' " the parties' agreement are generally considered broad in scope and have been "consistently interpreted as applying to extracontractual disputes between the contracting parties." (*Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 659, 660; accord, *Rice v. Downs* (2016) 248 Cal.App.4th 175, 186 [broad arbitration clauses may encompass tort claims as well as contract claims].)

In this case, plaintiff alleges that he is a "pre-paid cellphone customer of [defendant]." The claims in his complaint relate to defendant's allegedly improper billing practices for that prepaid cellphone service and defendant's allegedly improper refusal to provide call records regarding that prepaid cellphone service. The parties' broad arbitration provision encompasses "[a]ny claim or dispute . . . in any way related to or concerning the agreement, or the provision of services or products to [plaintiff],

including any billing disputes . . . ." (Some capitalization omitted.) In view of the broad language describing the covered claims, including any claim "in any way related to" "the provision of services" and "billing disputes," we readily determine that plaintiff's claims are encompassed by the arbitration provision. All the claims in his complaint relate to his prepaid cellphone service, including his claims regarding call records and his claim for negligent misrepresentation.

Second, we understand plaintiff to "contest[] both the existence and disclosure of the arbitration agreement" and to contend that the agreement is unconscionable and otherwise unenforceable. He argues that "T-Mobile did not prominently display or present [the arbitration agreement] before making a sale" (bold omitted), and that he "had no knowledge of entering into an Arbitration Agreement when the phone was activated on Apr 26, 2008 in a T-Mobile store." Plaintiff further contends that he was not given a 30-day period to opt out of the arbitration provision. Plaintiff also argues that the arbitration provision unfairly carves out claims that defendant may assign to a collection agency, which the collection agency may then pursue in court.

Plaintiff did not raise these arguments in opposition to defendant's petition to compel arbitration. The first time that plaintiff raised these arguments, if at all, was in connection with his motion for reconsideration. A motion for reconsideration must be based on "new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subd. (a).) "Courts have construed [Code of Civil Procedure] section 1008 to require a party filing an application for reconsideration . . . to show diligence with a satisfactory explanation for not having presented the new or different information earlier. [Citations.]" (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839.) "An order denying a motion for reconsideration is interpreted as a determination that the application does not meet the requirements of [Code of Civil Procedure] section 1008." (*Corns v. Miller* (1986) 181 Cal.App.3d 195, 202.) Here, plaintiff fails to establish that the trial court erred in denying his motion for

reconsideration. For example, plaintiff fails to demonstrate that he provided a satisfactory explanation in the motion for reconsideration for not bringing the new or different information regarding the purported unenforceability of the arbitration agreement to the trial court's attention earlier.

Third, we understand plaintiff to contend that the arbitration provision's restriction on public injunctive relief renders the arbitration provision unenforceable under *McGill, supra*, 2 Cal.5th 945. Plaintiff did not raise this issue in opposition to defendant's petition to compel arbitration. Instead, he raised it for the first time in his reply brief in support of his motion for reconsideration. Again, plaintiff fails to demonstrate that he provided a satisfactory explanation in the motion for reconsideration for not bringing the new issue to the trial court's attention earlier.

Even assuming plaintiff properly raised the issue below, we are not persuaded that his complaint includes a request for public injunctive relief, rather than solely private injunctive relief. Private injunctive relief is "relief that primarily 'resolve[s] a private dispute' between the parties [citation] and 'rectif[ies] individual wrongs' [citation], and that benefits the public, if at all, only incidentally." (*McGill, supra,* 2 Cal.5th at p. 955.) By comparison, public injunctive relief is "relief that 'by and large' benefits the general public [citation] and that benefits the plaintiff, 'if at all,' only 'incidental[ly]' and/or as 'a member of the general public' [citation]." (*Ibid.*) In *McGill,* the California Supreme Court held that an arbitration agreement that waives the right to seek public injunctive relief under the CLRA, the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), or the false advertising law (*id*., § 17500 et seq.) in any forum is contrary to California public policy and thus unenforceable under California law. (*McGill, supra*, at pp. 951-952.)

Here, plaintiff argues that public injunctive relief under the CLRA (§ 1750 et seq.) "cannot be preempted by private contract." (Fn. omitted.) He also argues that limiting

relief to him with no public benefit is "improper and contrary" to public policy under the CLRA.

Plaintiff's complaint, however, does not contain a cause of action under the CLRA. Indeed, the CLRA is not mentioned at all in his complaint. Likewise, it is not clear that he has alleged a claim for public injunctive relief under the unfair competition law or the false advertising law, as neither law is expressly alleged in his complaint. Further, his prayer for relief in the complaint includes only a general request "[f]or injunctive relief against [defendant] to prevent future wrongful conduct." Plaintiff does not persuasively articulate why this request for injunctive relief may properly be construed as a request for public injunctive relief in view of the allegations in his complaint. (See *McGill*, *supra*, 2 Cal.5th at pp. 956-957.)

In his reply brief on appeal, plaintiff requests that this court "use its judicial discretion to issue an order" to "amend [plaintiff's] original Complaint to add public injunctive relief claims." Plaintiff fails to provide legal authority establishing that this court has "judicial discretion" to issue such an order. Plaintiff cites *Adkins v. Comcast Corp.* (N.D.Cal., Feb. 15, 2018, No. 16-cv-05969-VC) 2018 U.S. Dist. LEXIS 26066, but in that case, a federal district court, not a state appellate court, granted the plaintiffs leave to amend their complaint to add a public injunctive relief claim. (*Id.* at p. *3.)

Fourth, we understand plaintiff to contend that the class action waiver in the arbitration provision is unenforceable and renders the arbitration agreement unconscionable. Plaintiff, however, did not allege any class claim in his complaint, and therefore the class action waiver is not applicable in this action. (See *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 714 [rejecting the plaintiff's argument that a class action waiver in an arbitration provision was unconscionable, where the class action waiver was not applicable in the case].) In his reply brief on appeal, plaintiff requests that this court "use its judicial discretion to issue an order" "for Class Action certification." As we have just explained, plaintiff did not

allege any class claim in his complaint, and he fails to provide legal authority establishing that this court has "judicial discretion" to issue such an order.

Fifth, we understand plaintiff to contend that requiring him "to go through tedious cost-incurring subpoenas and cost-incurring arbitration at [his] own expense, is unconscionable given that [he] has availed of a waiver of court fees." Although writ review may be warranted "[i]f the arbitration would appear to be unduly time consuming or expensive," the fact that plaintiff may have obtained a waiver of court fees in the judicial forum does not necessarily establish that the arbitration itself would be "unduly time consuming or expensive." (*Zembsch, supra,* 146 Cal.App.4th at p. 160.) Moreover, because plaintiff fails to demonstrate that his causes of action against defendant fall clearly outside the scope of the parties' arbitration agreement, or that the trial court otherwise improperly ordered his causes of action to arbitration, we determine that writ review is not justified in this case. (See *Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63, 68; *Medeiros, supra,* 146 Cal.App.4th at p. 1014, fn. 7.)

In sum, we determine that the order compelling arbitration is not appropriate for writ review. Because the challenged order is not appealable, plaintiff's appeal must be dismissed.

We also deny as moot defendant's motion for leave to file a sur-reply to plaintiff's reply brief on appeal. In addition, we deny plaintiff's motion for judicial notice of a T-Mobile store receipt, which plaintiff acknowledges was not submitted as evidence in the trial court. Plaintiff fails to establish that the receipt is a proper subject of judicial notice. (See Evid. Code, §§ 451, 452; *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 763, fn. 3 [denying judicial notice of evidence that was not presented to the trial court].)

IV. DISPOSITION

The appeal is dismissed. Defendant's motion for leave to file a sur-reply is denied. Plaintiff's motion for judicial notice is denied.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

ELIA, J.

D'Aguiar v. T-Mobile USA, Inc.
H045122